APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee* *vs.* KENNETH KOLOJAY, *Defendant-Appellant.*	No. 81-1231 DC# CR LV 79-106-2 MEMORANDUM
UNITED STATES OF AMERICA, *Plaintiff-Appellee* *vs.* WILLIAM APFEL, *Defendant-Appellant.*	No. 81-1232 DC# CR LV 79-106-1

Appeal from the United States District Court
for the District of Nevada
Roger D. Foley, District Judge, Presiding
Argued and Submitted April 6, 1982

(April 26, 1982)

Before: WRIGHT and SNEED, Circuit Judges,
and KENYON*, District Judge

Appellants were indicted on seven counts, the first two of

* Honorable David V. Kenyon, United States District Judge for the Central District of California, sitting by designation.

which charged violations of 18 U.S.C. § 844(i) (malicious destruction of property used in an activity affecting interstate commerce by means of an explosive), and the fourth and fifth of which charged appellants Apfel and Kolojay, respectively, with a violation of 18 U.S.C. § 1623 (false declaration before a federal grand jury). Appellants were acquitted on all counts in which they were charged other than the fourth count in the case of Apfel and the fifth in the case of Kolojay. On these counts they were convicted. We affirm the convictions.

I.

THE ISSUES

This case grows out of a fire at the Chicken Ranch, a brothel in Pahrump, Nevada. The chief government witness testified that appellant Apfel, the owner of a competing brothel in Lathrop, Nevada, hired the witness, appellant Kolojay, and one other to destroy the Chicken Ranch and that the three of them caused the fire. To overturn their convictions appellants jointly raise two issues and appellant Kolojay raises one applicable only to him. The first two are:

(1) Did the grand jury, as the appellants insist, lack jurisdiction to investigate the Chicken Ranch fire?

(2) Did the government fail to produce *Brady* material and to comply with the Jencks Act?

The third, applicable only to appellant Kolojay, is:

(3) Was the evidence sufficient to support the verdict of guilty against Kolojay?

II.

JURISDICTION OF THE GRAND JURY

Appellants contend that because the grand jury, before whom they made statements determined by a jury to be false, lacked authority to investigate an incident which involved only the crime of arson under Nevada law, their statements, even if false, did not amount to a violation of 18 U.S.C. § 1623. We reject this contention because we hold that the grand jury had authority to investigate the burning of the Chicken Ranch.

The mere possibility that violations of federal law have occurred is sufficient to provide authority for a grand jury investigation. *United States v. Sisack*, 527 F.2d 917, 920 (9th Cir. 1975). The possibility in this case rests, in part, on the fact that at the time of the investigation the law was not settled with respect to whether the use of a match to ignite uncontained gasoline was the use of an explosive, as defined by 18 U.S.C. § 844(j), for the purposes of the crime defined in 18 U.S.C. § 844(i). Recent case law suggests that use of a match to ignite a flammable liquid is not an explosive. *See United States v. Gere*, 662 F.2d 1291 (9th Cir. 1981) (photocopier fluid); *United States v. Birchfield*, 486 F. Supp. 137 (M.D. Tenn. 1980) (gasoline). The trial court in this case apparently held the same view. This is not controlling, however. A conviction for perjury

can be sustained even though it is eventually determined that the suspected federal violation which prompted the investigation cannot properly be prosecuted. *United States v. Sisack,* 527 F.2d 917 (9th Cir. 1975); *United States v. McInnis,* 601 F.2d 1319 (5th Cir. 1979), *cert. denied,* 445 U.S. 962 (1980).

The possibility that a violation of federal law had occurred also existed because of the proscription of the use of interstate facilities with the intent to carry out arson which appears in 18 U.S.C. § 1952 and the long reach of 18 U.S.C. § 1961, *et seq.*, the RICO statute. Under the latter, arson could be "racketeering activity" under 18 U.S.C. §1961(1)(A), a pattern of which could give rise to a RICO violation.

Under these circumstances appellants' reliance on *Brown v. United States,* 245 F.2d 549 (8th Cir. 1957), is misplaced. Unlike the investigation in *Brown,* the investigation in this case followed closely after the wrongful conduct. Moreover, both the investigation and the conduct took place in the same state, Nevada, and appellants not unreasonably were charged with crimes other than perjury. In no sense can the grand jury investigation in this case be described as being close to a fraud on the court. *See United States v. Mandujano,* 425 U.S. 564, 582-83 n.8 (1976).

III.

THE JENCKS ACT AND BRADY ISSUES

The copies of the FBI agent memoranda containing reports

of interviews of two witnesses are not "statements" within the meaning of the Jencks Act, 18 U.S.C. § 3500. Nothing in the record indicates that the memoranda were adopted or approved by the witnesses. They are general reports of witness interviews dictated and typed several days after the interviews. *Cf.* 18 U.S.C. § 3500(e)(2). Also they are not statements made by a witness to a grand jury, *Cf.* 18 U.S.C. §3500(e)(3).

Nor does *Mims v. United States*, 332 F.2d 944 (10th Cir.), *cert. denied*, 379 U.S. 888 (1964), suggest a different conclusion. There the government conceded the memorandum was a "statement" and was adopted by the witness before he testified. *Id.* at 948. Nothing resembling that occurred here.

The appellants' contentions with respect to *Brady v. Maryland*, 373 U.S. 83 (1963), fare no better. The material contained in the two memoranda which the appellants assert contained exculpatory evidence either was known by the appellants and investigated by their counsel or was information elicited upon cross-examination during the government's case with respect to which the delay in its receipt does not cast the shadow of a reasonable doubt about the appellants' guilt.

IV.

KOLOJAY'S SUFFIENCY OF THE EVIDENCE ISSUE

Although the evidence pertaining to appellant Kolojay's conviction is in conflict, the jury chose to believe the witnesses

supporting the government's case. We cannot say that a rational trier of fact could not have come to that conclusion. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979). The verdict was not irrational.

Finally, we hold that the questions asked of appellant Kolojay before the grand jury were sufficiently precise and unambiguous to justify the conclusion that his responses were intentionally false. The government established beyond a reasonable doubt that the appellant Kolojay understood the questions as did the government when it asked them and that his responses were false. *See United States v. Matthews*, 589 F.2d 442, 445 (9th Cir. 1978), *cert. denied*, 440 U.S. 972 (1979).

AFFIRMED.

The mandate shall issue immediately.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee* *vs.* KENNETH KOLOJAY, *Defendant-Appellant.*	No. 81-1231 ORDER

(June 7, 1982)

Before: WRIGHT and SNEED, Circuit Judges, and KENYON*, District Judge

Appellant Kolojay's petition for rehearing is denied.

* Honorable David V. Kenyon, United States District Judge for the Central District of California, sitting by designation.